

VINOD NICHANI|SBN 277607
NICHANI LAW FIRM
111 North Market Street, Suite 300
San Jose, California 95113
Phone: 408-800-6174
Fax: 408-290-9802
Email: vinod@nichanilawfirm.com

Attorney for
VAHE TASHJIAN, INDIVIDUALLY

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

In re

DUTCHINTS DEVELOPMENT, LLC

Debtor.

Case No.: 21-51255 MEH

Chapter 7

VAHE TASHJIAN'S RESPONSE TO
ORDER FOR VAHE TASHJIAN TO
APPEAR AND SHOW CAUSE RE:
CONTEMPT

Hearing:

Date: September 29, 2022
Time: 2:30 pm
Location: Courtroom 11
280 S. First Street
San Jose, CA

TO THE HON. M. ELAINE HAMMOND, UNITED STATES BANKRUPTCY JUDGE AND
THE CHAPTER 7 TRUSTEE:

PRELIMINARY STATEMENT

Dutchints Development LLC (hereinafter "Debtor") was organized in the state of
California on July 25, 2016. Pursuant to the Amended and Restated Operating Agreement the

1 manager was Vahe Tashjian (hereinafter “Tashjian”). Tashjian never was an employee of
2 Debtor, but instead the chief executive.

3 On September 29, 2021, the Debtor filed a voluntary petition (the “Petition”) for relief
4 under Chapter 11 of the Bankruptcy Code. On December 20, 2021, the Office of the United
5 States Trustee appointed an official committee of unsecured creditors. On February 11, 2022, the
6 Court entered an order converting the Bankruptcy Case to a case under Chapter 7 of the
7 Bankruptcy Code. Thereafter, on April 28, 2022, the Court entered an order confirming the
8 Trustee as the permanent Chapter 7 trustee in this bankruptcy Case. Tashjian has invoked his
9 Fifth Amendment privilege against self-incrimination.
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11 The subject turnover order that is the focus of the Order For Vahe Tashjian to Appear and
12 Show Cause Re: Contempt (hereinafter “OSC”) requires Tashjian to provide administrator
13 access and passwords. In summary, the Trustee requires access to the Google Accounts and
14 Quickbooks accounts that Debtor has used in the past. The computers for the debtor have already
15 been provided to the trustee.
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18 **ACCESS TO THE GMAIL ACCOUNT VIOLATES TASHJIAN’S RIGHTS.**

19 A corporation is considered a “person” for many purposes, including determining who is
20 eligible to file a Chapter 7 or Chapter 11 petition. (11 U.S.C. §§101(41) (1994) (“person”)
21 includes individual, partnership, and corporation”). Yet, “[a] corporation is not a ‘person’
22 entitled to claim the Fifth Amendment’s privilege against self-incrimination.” *In re Marine*
23 *Power & Equip. Co.*, 67 B.R. 643, 649 (Bankr. W.D. Wash. 1986). Only an individual may assert
24 a claim of privilege against self-incrimination. “[F]or purposes of the Fifth Amendment,
25 corporations and other collective entities are treated differently from individuals...[in that] a
26 corporation has no Fifth Amendment privilege.” *Braswell v. United States*, 487 U.S. 99, 104
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(1988) citing *Hale v. Henkel*, 201 U.S. 43 (1906). The Supreme Court held that a custodian of corporate records may not resist a subpoena for such records on the ground that production would personally incriminate him in violation of the Fifth Amendment. *Elias v. United States (In re Grand Jury Proceedings)*, No. 97-36211, 1998 U.S. App. LEXIS 667 (9th Cir. Jan. 14, 1998) citing *Braswell v. United States*, 487 U.S. 99, 101 L. Ed. 2d 98, 108 S. Ct. 2284 (1988).

However, “There is a distinction between individuals acting as corporate officers and individuals in their personal capacity; in their personal capacity they may be entitled to invoke the privilege against self-incrimination.” *In re Marine Power & Equip. Co.*, 67 B.R. 643, 649 (W.D. Wash. 1986) (citing *Curcio v. United States*, 354 U.S. 118(1957)).

Mr. Tashjian was not an employee.

The *Trustee’s Status Report Regarding Production of Documents by Vahe Tashjian on Behalf of Debtor* references the below-mentioned paragraph from the Debtor’s handbook:

Privacy and Monitoring

Computer hardware, software, email, Internet connections, and all other computer, data storage or ECS provided by DUTCHINTS DEVELOPMENT LLC are the property of DUTCHINTS DEVELOPMENT LLC. Employees have no right to personal privacy when using DUTCHINTS DEVELOPMENT LLC’S ECS(1). To ensure productivity of employees, compliance with this policy and with all applicable laws, including harassment and anti-discrimination laws, computer, email and internet usage may be monitored.

The lack of expectation of privacy through the handbook applies to employees of Dutchints, not the managing director. The handbook was only published on April 26, 2019, clearly a couple of years after the Debtor was organized.

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2 **Mr. Tashjian is the owner of the Google Workspace System.**

3 The Google Workspace system was purchased in July 22, 2016, by Tashjian. The Debtor
4 was organized on July 25, 2016. Tashjian, as owner of the account, allowed the Debtor use of
5 said services. The rights to said Google Workspace system was never sold or assigned to the
6 Debtor. The Gmail account obtained through Google Workspace includes emails related to the
7 debtor, but also personal emails related to Tashjian individually and attorney client privileged
8 matter that could be related to his personal matters. There is no doubt that Tashjian is the
9 custodian of some emails on behalf of the Debtor, but not all emails. Production of emails, which
10 could be considered documents that do not belong nor were written on behalf of the Debtor,
11 could be incriminating for Tashjian.
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14 Documents may be incriminating in two ways. First, and perhaps more obviously, the
15 contents of the documents may be incriminating. Nevertheless, the simple act of producing
16 documents also may be incriminating. *Butcher v. Bailey*, 753 F.2d 465,469 (6th Cir. 1985) (citing
17 *United States v. Doe*, 465 U.S. 605,613 n. 11(1984). The *Butcher* decision concluded that
18 implicit authentication through the act of production might be sufficiently testimonial to be
19 incriminating. *Butcher v. Bailey* at 469. The Sixth Circuit remanded the case to the bankruptcy
20 court, where the debtors were required to classify the documents and show how the implicit
21 authentication by production of any class of documents would be incriminating. *Butcher v.*
22 *Bailey* at 470. If authentication of a class of documents was a foregone conclusion, then the
23 documents would not be privileged. *Id.* "On the other hand, if authentication is not a foregone
24 conclusion, debtor's act of authentication would be incriminating--as a link in the chain of
25 evidence--only if the nature of the documents indicated that their contents might be
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1 incriminating." *In re Ross*, 156 B.R. 272 (Bankr. D. Idaho 1993) at 279. It is questionable
2 whether the Gmail account belongs to the Debtor or Tashjian since the account was owned by
3 Tashjian, but the Debtor was allowed to use the services. In that the account has been active
4 since 2016, a simple search term would not assist in defining the intention of each email. It
5 would take time and possibly a third party akin to a referee/special master to review each email
6 for privileged material, prior to production.
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8 **Google Drive Account**

9 Tashjian produced a tranche of documents related to the Google Drive account for
10 Debtor. (Doc #242 Para.6). To support questions as to whether all items on the Google Drive
11 account have been produced, Tashjian produced a link to said Google Drive account through
12 counsel on September 21, 2022. Counsel for the Trustee had trouble accessing the Google Drive
13 account. As a result, Mr.Tashjian again produced a link to the account on September 28, 2022.
14 Tashjian will work with the Trustee as required to provide access.
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16 **Quickbooks**

17 Tashjian is diligently working with the Debtor's prior employees to access Quickbooks.
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19 **CONCLUSION**

20 Under the cloud of possible criminal investigation, Tashjian has had to navigate the
21 waters of this proceeding with great care to comply with the Trustee's requests and Court orders
22 while at the same time avoiding a waiver of his individual Fifth Amendment right against self-
23 incrimination. Tashjian has sought to cooperate with the Trustee, such as meeting at counsel for
24 the Trustee's office in San Francisco and discussing the Debtor's business, questionable
25 creditors, and the recovery of assets. Additionally, Tashjian has allowed access to the Trustee's
26 representative to locate and collect the Debtor's computers and items. Tashjian is complying to
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1 the best of his ability. Additionally, Tashjian requests a discovery referee/special master or a
2 professional to be appointed to facilitate and oversee the transfer of the Gmail accounts to the
3 trustee. Due to the efforts of Tashjian and his interest in cooperating with the Trustee, the
4 contempt order should be denied.

5 **WHEREFORE**, the Mr. Tashjian respectfully requests that the Court considers this
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7 Opposition

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9 Dated: September 29, 2022

NICHANI LAW FIRM

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11 /s/ Vinod Nichani
12 VINOD NICHANI
13 Attorney for Vahe Tashjian, Individually
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